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JAN 15 1963
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IN THE

Supreme Court of the United States

October Term, 1962.

No. 743

NICHOLAS A. STIRONE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Nicholas A. Stirone, by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on November 26, 1962 and upon which a petition for rehearing was denied on December 17, 1962.

OPINIONS BELOW.

As this case has been in this Court previously, we give the whole citation record. The opinion of the District Court after the first trial is reported at 168 F. Supp. 490. The opinion on the original appeal to the United States Court of Appeals for the Third Circuit is reported at 262 F. 2d 571. The per curiam opinion denying rehearing appears at 262 F. 2d 580. The dissenting opinion of Chief Judge Biggs (in which Judge Hastie joined) on rehearing is reported at 262 F. 2d 580. This conviction was unanimously reversed: *Stirone v. United States*, 361 U. S. 212, 80 S. Ct. 270 (1960).

Thereafter, in the District Court, petitioner then raised the jurisdiction issue created by the original holding of this Court. An appeal was taken and upon a motion the appeal was docketed and dismissed by the Court of Appeals for want of jurisdiction per Order of January 23, 1961 (see Petition for Writ of Certiorari in this Court, October Term, 1960, No. 744, Appendix B, p. 11). A petition for Writ of Certiorari was then denied at 365 U. S. 871.

On retrial of the case the District Court filed no opinion. The Court of Appeals affirmed the judgment of conviction at the second trial in an opinion filed on November 26, 1962 which is not yet reported. Petition for rehearing in the Court of Appeals for the Third Circuit was denied on December 17, 1962 (16a, *infra*).

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 26, 1962. Petition for rehearing thereon was denied on December 17, 1962.

The jurisdiction of this Court is invoked under C. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

A. When this Court held that the indictment was amended was not the indictment then void?

B. Was not the petitioner deprived of his constiutional right to be tried on an indictment as drawn by a grand jury when he was tried a second time on the indictment which this Court held had been amended?

C. Where the indictment and bill of particulars charged specifically that petitioner had extorted money from a local concrete manufacturer by a threat that petitioner would obstruct and prevent performance of alleged victim's *existing* contract to supply ready mixed concrete and thus interfere with interstate commerce, may petitioner be tried on a charge, not mentioned in the indictment, that he did threaten to interfere with, obstruct and prevent the alleged victim from obtaining other speculative, *future*, non-defined, *non-existent* contracts with as yet unknown persons?

D. In criminal trial under the Hobbs Act in the Federal Courts is not a litigant deprived of due process of law when the charge of the court is incomprehensible; fails to spell out the elements of the crime charged; does not relate the evidence in the case to the law of the offense; completely ignores the defenses offered; and fails to state that the alleged fear of the alleged victim must be reasonable and clearly arise from the evidence and must be that fear charged in the indictment and none other?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED.

1. United States Constitution, Amendment V:

"No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

2. United States Constitution, Article 1, Section 8, Clause 3:

"The Congress shall have power * * * To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

3. Hobbs Act, 18 U. S. C. § 1951(a):

"Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

STATEMENT OF THE CASE.

Petitioner, a well-known labor leader in Allegheny County, Pennsylvania, was accused of violating the Hobbs Anti-Racketeering Act. Such an alleged crime is a felony and since it is, the Fifth Amendment of the Constitution of the United States required an indictment by a grand jury.[1] Petitioner's prominence lent sensational overtones to the trial. The first trial of this matter was heard by the Hon. John L. Miller, in the Western District of Pennsylvania. After petitioner was found guilty, the trial court imposed what then appeared to be a severe sentence of three (3) years imprisonment, $5,000 fine and costs of prosecution.

An appeal was taken from that conviction. Myriad grounds for reversal were assigned, primarily directed to numerous evidentiary questions raised in the court below. The Court of Appeals for the Third Circuit affirmed the conviction in a 2-1 opinion. 262 F. 2d 571. This Court unanimously reversed the judgment of conviction on the ground that evidence had been admitted and the jury instructed on matters beyond the scope of the crime charged in the indictment as handed down by the grand jury.[2] In other words, the trial judge had, without authority, voided the indictment by in effect amending it by admitting evidence and charging on conduct beyond that charged in the indictment. In so doing, the trial judge had added nothing in writing and crossed out nothing from the indictment. After the action of the Supreme Court, petitioner protested repeatedly that there no longer remained a valid indictment on which to try him. These protests included an attempt, jurisdictionally unsuccessful, to appeal to the Court of Appeals and subsequently to have a Writ of Certiorari issued out of this Court.[3]

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1. See *Stirone v. United States*, 361 U. S. 212, 215 (1960).
2. 361 U. S. 212, 80 S. Ct. 270 (1960).
3. See "Opinions Below", *supra*.

Petitioner was tried a second time on the same indictment before the Honorable Joseph P. Willson. Notwithstanding petitioner's contention that there remained no subsisting valid indictment on which to try him after this Court had ruled that the original indictment had been amended at the first trial by the trial court, petitioner was overruled and a jury returned a verdict of guilty. In its opinion thereon, the Court of Appeals rejected the argument that the indictment had been vitiated by being amended at the first trial.

The trial was fraught with erroneous evidentiary rulings and befogged by a charge steeped in confusion and unintelligible verbiage. In the interim between the two trials, petitioner had suffered two coronary attacks, a siege of serious kidney infections, a prostate condition and four hospitalizations (296a, 301a). Petitioner had committed no crime in the interim, had been charged with no offense, and had led a life free of discredit (303a). Judge Willson obviously ignored these ameliorating factors and, in giving full vent to his apparent distaste for petitioner, he imposed a sentence of 10 years imprisonment and $10,000 for the same offense which Judge Miller had found to warrant a sentence of 3 years and $5,000 at a time when petitioner's health was considerably better.

The whole case against the petitioner rested solely upon the testimony of *one* man: William G. Rider. He was directly and totally contradicted by four reputable business people. Rider had just started in the business of supplying ready mixed concrete in 1951 (29a), the year in which the alleged extortion took place. He continued in that business only until 1954, when he was thrown into bankruptcy (41a-42a).

Prior to the events here involved, Rider's supply company was engaged in business at Charleroi, Pennsylvania. It had entered into a contract whereby it was required to purchase all its sand and slag from Duquesne Slag Company which had its place of business at Belle

Vernon, Pennsylvania. Dierker was president of that firm. In connection with that contract, Rider maintained a trailer office and a batching plant at Duquesne's yards at Belle Vernon.

Rider testified that in late August or early September of 1951, he had orally received a contract from Jacob G. Kassab, Vice-President of the general contracting concern of Ragnor-Benson, Inc., to supply ready mixed concrete for the construction of a steel processing plant at Allenport. That contract was not put in writing until September 25, 1951 (32a). That date was admittedly *after* the alleged extortion by the petitioner. Duquesne Slag Products Co. was to supply Rider with slag which he was to mix with his cement to make concrete for the Allenport project.

At one point Rider testified that petitioner had, sometime after September 13, 1951, demanded of him 50 cents per cubic yard of concrete supplied to the Allenport steel plant in return for keeping Rider out of labor trouble in connection with a firm contract he claimed he had previously concluded with Ragnor-Benson, Inc. This was supposed to have occurred in Dierker's automobile at Belle Vernon, Pennsylvania in the presence of Dierker (35a-37a).

Admittedly there was only *one* conversation between Rider and Stirone relative to this contract (49a-50a).

This was the sole competent testimony which the prosecution was able to produce of any alleged extortion by the petitioner. The prosecution rested its entire case on this uncorroborated and later self-impeached testimony.

As against that, there was testimony that Duquesne Slag Company was extremely anxious to increase its business (48a). It wanted to participate in the supply of materials on the new proposed Pittsburgh Steel Company plant at Allenport, Pennsylvania. In order to achieve this legitimate end, Duquesne arranged a meeting between Rider, one of its customers who it knew was bidding on the Allenport job, and Stirone who it believed could assist

Rider in getting the contract from Ragnor-Benson, Inc., the general contractors, for Pittsburgh Steel. This meeting was held in the Pittsburgh offices of Duquesne Slag Company. It was attended by Dierker, President of Duquesne, Stirone and Rider, for his company. Catherine Perry, a receptionist in the office of Duquesne Slag, testified in corroboration, that this meeting took place in Pittsburgh and at the time stated by those just mentioned (247a).

Duquesne Slag agreed to adjust its charges for material and rental of facilities to Rider Supply so as to bear the cost of Stirone's commissions for his services (60a, 63a). This meant Duquesne Slag—not Rider—was to pay Stirone's commissions. The trial court's charge ignored this crucial contradiction of Rider's testimony.

Kassab, the president of Ragnor-Benson, Inc., testified that it was Stirone who prevailed on him to award the contract to Rider Supply Company (260a, 261a). That contract was made and executed on September 25, 1951 and delivered to Rider Supply on September 28, 1951. All of the documentary evidence completely supports the contention of the petitioner that the payments made to him by Rider's Supply Company were made pursuant to the agreement reached in *Pittsburgh* at Duquesne Slag's offices whereby Stirone was to be paid a *commission* for obtaining the contract from Kassab at Ragnor-Benson. Rider carried the Stirone payments on his books as commissions (96a). Each check was accompanied by an invoice marked *commissions* (defendant's Ex. C, 110a). A letter from Rider Supply written September 19, 1952 enclosing a check for $1500 referred to the payment as "*commissions* we owe you" (defendant's Ex. D, 114a). (Emphasis supplied.)

At one point in his direct examination, Rider revealingly disclosed he did not have a firm contract with Ragnor at the time of his meeting with Stirone. He said that elsewhere he had obligated himself deeply by the purchase of trucks and equipment and could not afford to have them idle

(37a). He needed desperately to get the Ragnor job (46a). He said that he had agreed to pay Stirone because "if [he] didn't get the contract . . ." (37a) he would not be able to meet the payments for the trucks. The payments were debts in the amount of $175,000 which Rider owed for new trucks and mixers purchased for earlier jobs which admittedly he was very anxious to keep in action so as to be able to pay for them. This phrase speaks of a contract not yet acquired. It proved that he did not have the contract as yet. It is diametrically opposed to the earlier claim that he already had it. It is also in direct conflict with the indictment and the bill of particulars, each of which charges that petitioner did threaten Rider with the loss of the *Ragnor* contract he *already* had unless he yielded to Stirone's demands for extortion money (14a). The charge ignored this too.

At several other points, the trial court, *sua sponte*, developed from Rider that he paid petitioner because he was afraid he would get no *more*, i.e., future contracts (69a, 70a). *This does not meet the indictment's accusation that Rider was put in fear that he would be prevented from completing this allegedly existing contract.* By allowing this substantial revision of the indictment, the trial court violated the command of this Court's previous opinion just as formidably as did the first trial judge when he ruled that the jury could consider whether steel products later to be manufactured by the plant after erection could be the subject of affected interstate commerce. Future contracts were not the subject of the grand jury's indictment or of the U. S. Attorney's bill of particulars.

Even when led and prodded by the court, Rider contradicted himself and admitted that he had agreed to pay the money only because he was going to be reimbursed (60a, 63a). Hence, it was to cost Rider nothing. He said that Dierker had agreed to make good to him any money he paid Stirone (60a, 63a). He said that he had previously instantly rejected the demanded payments (thus evincing no

fear) until he was assured that Dierker and not he was actually paying the money (60a). If this was true, this did not meet the gist of the offense stated in the indictment that Stirone had put Rider in fear. Without proof of fear, the crime set forth in the indictment is not made out. The charge ignored this too. The jury's verdict does not reveal whether it was based (1) on the fear alleged in the indictment, which related to the possible loss of an existing contract, or (2) on a contract he hoped to get in the future at Allenport, or (3) on future contracts at large. *The judge did not charge the jury that a guilty verdict could not rest on the last two speculative possibilities for which petitioner was not indicted.* He permitted a finding of guilt which may have been founded on (2) or (3). He admitted evidence of all these items. Indeed his charge made possible a conviction based on interference with undefined, nonexistent, possible future contracts that Rider might some day get. This was patent error. It added a charge not made by the grand jury in its indictment.

It was uncontradicted that the petitioner had no jurisdiction whatsoever over any of Rider's employees, nor did he have any connection with any union that had jurisdiction over them in any way (195a). In charging the jury, the trial court did not discuss this obvious weakness in the prosecution claim. One who had no control over a union could not compel its members to strike. Hence there was no reasonable cause for Rider to fear petitioner.

Moreover, Rider admitted on cross-examination that in fact he had had more labor trouble on this Allenport job than he had ever had before in all the years that he had been in the construction and road business (61a). This situation would certainly have led him to stop his payments to Stirone if Stirone had in fact made an agreement to keep this job free of labor trouble and if he had not lived up to that alleged agreement. But Rider, nonetheless faithfully continued making his payments for three years. Certainly Rider would not have continued to pay for protection he

was not getting. The trial court failed to utter one word of comment to the jury about this major challenge to the prosecution's contention that Stirone did or could put Rider in fear.

Mrs. Jeanne Rider, Rider's wife, office manager and bookkeeper in 1951 (80a-81a) in addition to relating much detrimental and prejudicial hearsay testimony concerning the relationship between Rider and the petitioner (86a-91a), testified that Rider paid the petitioner the first payment of $1,500 on February 28, 1952 (93a). She admitted that all payments made to petitioner had been put in the ledger as "commissions" (96a). All Rider's invoices and letters referred to these payments as "commissions" (Ex. C and D, 110a, 114a). These comport with and corroborate completely petitioner's explanation that he had been paid for getting the contract and were in no way a form of extortion. In commenting on this evidence, the trial judge did so in a way that destroyed the corroboration it should have lent to the petitioner's case. Instead, he twisted it into an unfair insinuation that the petitioner was perpetrating, or had in the past, perpetrated tax frauds and that he had probably engaged in other illegal ventures involving unreported cash receipts (215a).

The trial court failed to charge the jury that even if Rider was put in fear, it had to be a reasonable one based on the surrounding facts as he had himself related them and could not be based on some abstract hypothetical anxiety.

The trial judge failed to comment on multiple evidentiary facts that in some instances directly contradicted the thin proof of the prosecution and indeed sometimes completely proved them false. For example, defendant had made a complete denial that any conversation took place between Rider and Stirone *at the time and place* given by Rider. Rider said it happened in Belle Vernon after September 13, 1951 and before September 25, 1951. A documented alibi to the contrary was proven as to Stirone's

whereabouts at the time. Four people testified that Stirone and Rider had met in Pittsburgh late in August or early in September (223a, 248a, 176a). Admittedly they had had only one meeting. The trial judge ignored all this in his charge.

As a result of the judicial conduct here involved and the charge given in a most prejudicial, confusing and inadequate manner, the petitioner was convicted.

The motion for a new trial was denied. The appeal to the Court of Appeals followed. It sustained the conviction (15a, *infra*) and denied a timely petition for rehearing (16a, *infra*).

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

1. This case is one of first impression and involves considerations of basic importance in the federal administration of criminal justice. This Court has held that the rule of *Ex parte Bain*, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849 (1887), applies to this case because the indictment of the Grand Jury had been in effect amended by the trial judge. *Stirone v. United States*, 361 U. S. 212 (1960). On resubmission, the District Court and the Court of Appeals for the Third Circuit have refused to follow what this Court in *Ex parte Bain*, *supra*, said necessarily follows when an indictment has been judicially amended: the jurisdiction of the offense is absent and the indictment is thereafter a nullity.

In its present posture, this case presents a state of affairs substantively indistinguishable from *Ex parte Bain*, *supra*, the surface distinction being that the indictment document here was not physically altered as it was in that case. We submit that this Court should now hold that the *Bain* rule is not restricted to mere physical alteration of an indictment.

2. The decision of the court below holds that when petitioner was charged in the indictment with alleged crime A and tried thereon, the jury may also hear at the same time evidence of alleged crime B even though the indictment does not charge him with committing crime B. Petitioner has thereby been denied the rights the Fifth Amendment of the Constitution guaranteed to one in his situation.

3. Petitioner has been deprived of due process and a fair trial when the crime charged in the indictment was not defined and the charge of the court was utterly incomprehensible and confused. The court failed to relate the evidence to the charge of the indictment, completely ignored the defenses of petitioner.

4. The United States Court of Appeals for the Third Circuit is in direct conflict with the Court of Appeals for the Second Circuit in its decision in *United States v. Tolub*, 309 F. 2d 286, 289 (C. A. 2, 1962).

ARGUMENT.

Point I.

Once an Indictment Has Been Amended, a New Indictment by the Grand Jury Is Constitutionally Required if a Defendant Is to Be Tried on the Original Charge.

The Court of Appeals in its decision rendered Nov. 26, 1962, per McLaughlin, J., committed grievous errors. In commenting on the validity of the indictment once this Court had ruled that it had in effect been amended, the Court of Appeals held that the indictment could nonetheless be used again. It held that there was no necessity to go back to the Grand Jury for a new indictment, saying, "Since there are no defects in the present indictment to be corrected, there is no reason for resubmitting it" (3a, *infra*). The error of this logic is self-evident. Whether anything was written on the paper which set forth the indictment does not resolve the question. The test is what the trial judge did to the substance of the indictment in the trial of the case.

This Court has already ruled here that "Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same" (361 U. S. 217, 80 S. Ct. 273). Mr. Justice Harlan in his dissenting opinion in *Russell v. United States*, — U. S. —, 82 S. Ct. 1038 (1962), interpreting *Ex parte Bain*, recognized that when a court does acts amounting to an amendment of the indictment the indictment dies. In *Ex parte Bain, supra*, the Court said that once an indictment has been amended,

> ". . . *the jurisdiction of the offense is gone*, and the court has no right to proceed any further in the progress of the case for want of an indictment . . . *he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned.*" (121 U. S. 13, 7 S. Ct. 788) (Emphases supplied.)

This certainly means that what occurred in the first trial below was an amendment to the indictment, and a substantial amendment indeed. The conviction there was set aside.

The law of the case now requires the application of accepted principles that arise when the grand jury's indictment has been amended. For the amendment of the indictment deprived the court of the power of proceeding to try the petitioner on the original indictment again. The law is clear. We need but quote from *Ex parte Bain*, 121 U. S. 1, 13, 7 S. Ct. 781, 787-788 (1887), where this Court said per Mr. Justice Miller:

> "It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. *The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it.* Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. *It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime, for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any*

further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the constitution, can be 'held to answer', he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence. The case comes within the principles laid down by this court in *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Wilson*, 114 U. S. 418, 5 Sup. Ct. Rep. 935, and other cases." [Emphases supplied.]

The area of law covered by *Ex parte Bain, supra*, was reviewed in the original *United States v. Stirone, supra*. The Court reviewed this subject in *Russell v. United States*, — U. S. —, 82 S. Ct. 1038 (1962), as noted above. It again held that once an indictment has been amended the jurisdiction of the offense is gone. Indeed in that case Mr. Justice Harlan, in dissent, conceded that and had no disagreement with it. He interpreted the holding of the Court to mean that the prosecutor could not introduce or argue at trial evidence or theories, however relevant to the crime charged in the indictment, which he had not presented to the grand jury. In his opinion at 82 S. Ct. 1062 he made this most explicit. There he said:

"The final point made by the Court is perhaps the most novel of all. It is said that a statement of the subject under inquiry is necessary in the indictment in order to fend against the possibility that a defendant may be convicted on a theory of pertinency based upon a subject under investigation different from that which may have been found by the grand jury . . .

"This proposition is also certainly unsound on principle. *In the last analysis it would mean that a*

> *prosecutor could not safely introduce or advocate at a trial evidence or theories, however relevant to the crime charged in the indictment, which he had not presented to the grand jury.* Such cases as *Ex parte Bain*, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849; *United States v. Norris*, 281 U. S. 619, 50 S. Ct. 424, 74 L. Ed. 1076, and *Stirone v. United States*, 361 U. S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252, lend no support to the Court's thesis. They held only that, consistently with the Fifth Amendment, a trial judge could not amend the indictment itself, either by striking or adding material language, or, *amounting to the latter*, by permitting a conviction on evidence or theories not fairly embraced in the charges made in the indictment. To allow this would in effect permit a defendant to be put to trial upon an indictment found not by a grand jury but by a judge." [Emphases supplied.]

Indeed as may be noted the phrase "amounting to the latter" covers those situations where the court *in substance* has amended the indictment without bothering to apply pen or pencil to the paper upon which it is written. The indictment becomes a nullity once it is amended in substance whether that be done by writing on the indictment or by admitting evidence beyond the scope of the crime charged. The court must lose jurisdiction of the offense.

It is clear from *United States v. Norris*, 281 U. S. 619, 50 S. Ct. 424 (1930), that an indictment can be nullified in ways other than physically altering the document itself as was done in *Ex parte Bain, supra*. It was there stated that a stipulation of fact (by definition, a voluntary agreement) cannot alter any particular of an indictment. The Court held, per Mr. Justice Sutherland at 50 S. Ct. 425, that: ". . . the stipulation was ineffective to import an issue as to the sufficiency of the indictment . . . If the stipulation be regarded as adding particulars to the indictment, it must fall before the rule that nothing can be added to an indictment without the concurrence of the grand jury by which the

bill was found. *Ex parte Bain*, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849. If filed before plea and given effect, *such a stipulation would oust the jurisdiction of the court''*. [Emphasis ours.]

Ex parte Bain, supra, prohibits physical alteration of the indictment itself. *Norris, supra*, on the same rationale which bottoms *Ex parte Bain, supra*, teaches that an indictment can be nullified by alteration other than physical change in the document itself. It is a logical, just and important development that this Court now announce that the Fifth Amendment commands the nullification of the instant indictment in view of what occurred in the trial court in the original trial.

Constitutional rights are destroyed when a person is subjected to a trial on charges beyond and different from those returned by the grand jury itself. Should this occur, as it did here, the rule must be that the accused must be discharged from the custody of the court, the indictment being nullified.

The Court of Appeals below cited no new cases to back up its reasoning denying the demanded discharge. What it did cite was *State v. Smith*, 49 La. Ann. 1515, 22 So. 882 (1897), the pertinence of which, we respectfully submit, is difficult to discern. Nor did the opinion of that court answer the explicit language in *Ex Parte Bain, supra*. It does not mention *United States v. Norris, supra*, and it ignores the positive holding of *United States v. Stirone, supra*, that there had been an amendment of the indictment in *this* case just as though it had been written on the indictment. That court completely fails to answer the teaching of *Russell v. United States, supra*, and the concessions which even the dissenters there yield.

On the contrary, the position of the Court of Appeals is, by exact analogy, one which would have compelled the retrial of Bain in *Ex parte Bain*, rather than his discharge from custody which in fact was what this Court decided there.

The fact is that the Court of Appeals below was in error in its refusal to extract and apply the conclusion of *Ex parte Bain* to this case, and we are equally content, as we demonstrate *infra*, that a reading of this record will disclose it was also in certain error in concluding that petitioner's second trial did not expose him to charges beyond the indictment.

Point II.

The Petitioner Has Been Subjected to a Trial on Offenses Not Charged in the Indictment.

There is no doubt that in the second trial of this case the learned trial judge submitted the case to the jury in a manner precisely like that which generated the holding and teaching of *United States v. Stirone*, 361 U. S. 212, 80 S. Ct. 270 (1960).

In the original trial of the case the judgment was set aside and the conviction reversed, because the jury was permitted to consider whether defendant's conduct had affected interstate commerce to the extent that steel products which might later be manufactured in buildings to be constructed might not move freely in the main stream of commerce. This was not in the indictment.

The defendant was charged in the indictment with ". . . threats of the loss of, and obstruction and prevention of, performance of his [Rider's] contract to supply ready mixed concrete." (14a) and ". . . did knowingly, wilfully and unlawfully obstruct, delay and affect interstate commerce . . ." (14a). In reply to a bill of particulars filed by the defendant, the government said that the charge against the defendant was that he ". . . extorted from William G. Rider . . . by threats that he would prevent said William G. Rider from carrying out a contract to supply ready mixed concrete to Ragnor Benson Inc. . . ." (316a) and that defendant would see to it that Rider ". . .

did not hold his contract" (317a) . . . and that defendant would ". . . cause Rider to lose and be unable to comply with his contract to supply ready mixed concrete to Ragnor Benson, Inc." (318a). (Emphasis supplied.)

The gist of these charges was that Rider had an existing present contract with Ragnor-Benson, Inc. and that the petitioner did threaten to prevent Rider from holding, fulfilling and completing *that* contract. There just was no charge in the indictment that the petitioner did threaten to prevent Rider from getting any future contracts. Future contracts were in no way the subject of the indictment. They are as distinguishable as any two things could possibly be. Therefore, permitting proof and charging upon extortion relative to future contracts flys directly in the face of the opinion in *Stirone v. United States*, 361 U. S. 212, 80 S. C. 270 (1960). Nothing could be more prejudicial. Yet the court permitted the witness to testify at pp. 69a-70a:

> "THE WITNESS: If I didn't pay the 50 cents, I knew I wasn't going to get any *more* contracts. Wouldn't be able to get any *more* . . ." (Emphasis supplied.)

and later on the next page, the court *on its own* suggested:

> "THE COURT: You wouldn't get any other jobs, either, is that it?
>
> THE WITNESS: That's right.
>
> THE COURT: You had that in mind that day?
>
> THE WITNESS: I had that in mind.
>
> THE COURT: Is that at least part of the reason why you agreed to the 50 cents?
>
> THE WITNESS: That's right."

Thus, not only was the witness introducing a prohibited and most prejudicial subject, but the court itself was actively participating in violating that prohibition.

Threats to future contracts were in no possible way covered by the indictment as drawn by the grand jury. It was just as forbidden as a basis for conviction as were the future steel products of the future steel plant at the first trial. But the trial judge here allowed, indeed invited, it in and then personally made it so clearly the possible ground of the conviction that followed. This was palpable error.

We have no way of knowing whether the defendant was convicted on this extraneous element that he was interfering with future contracts. Once again in breach of the holding of this Court in the original *Stirone* opinion, the trial judge in this same matter was in effect amending the indictment all over again and allowing the jury to convict on an offense not charged in the indictment, viz.: interference with *future* contracts.

With respect to this error, there is no choice but to grant a new trial. In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U. S. 19, 82 S. Ct. 1130 (1962), the Supreme Court said at 82 S. Ct. 1136 (per Mr. Justice Clark):

> "Since we hold erroneous one theory of liability upon which the general verdict may have rested . . . it is unnecessary for us to explore the legality of the other theories. As was stated of a general verdict in Maryland v. Baldwin, 112 U. S. 490, 493, 5 S. Ct. 278, 280, 28 L. Ed. 822 (1884), [I]ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld * * *"

The amazing thing about it all is that after the Court of Appeals conceded that testimony had been admitted to establish that:

> ". . . [Rider] would not obtain any more contracts in the future." (See p. 5a of the opinion, appended herewith.)

it went on to say that:

> "Appellant's objection to the admissibility of the latter statement is not well taken. It is well settled that testimony showing the state of mind of the victim is permitted in Hobbs Act cases." (p. 5a of opinion.)

It then quotes from a case so holding. We have no complaint with the proposition that evidence of state of mind is admissible to show fear. But that fear must arise in connection with the very offense set forth in the indictment and not in relation to some strange matter not the subject or the gist of the indictment itself. The mental processes of Rider that related to the fear that he would not get *future* contracts are alien to this case and are irrelevant and immaterial. The defendant was not charged in the indictment or the answer to the bill of particulars with threatening to cause Rider to lose future contracts. Only Rider's fear, if any, pertaining to the issue of his presently existing contract as described and circumscribed by the indictment and the answers to the bill of particulars could be relevant and admissible. It is the duty of the trial judge or the appellate court on review to make certain that such prejudicial material be not admitted in evidence and become the subject of consideration by the jury. It is the duty of the trial court and the appellate court to set aside a conviction if there be any reasonable suspicion that such improper evidence has been admitted that may have prejudicially affected the jury's consideration of the true issue in the case. And the true issue in the case was in no way related to any fear that Rider may have had in respect to obtaining *future* contracts. Substantial reversible error has been committed.

In addition to the above considerations, an entirely different segment of the Fifth Amendment of the Federal Constitution is also involved here. If a defendant in a criminal matter is subjected to a trial on an offense not mentioned in the indictment (in this case interference with future contracts), a new grand jury may later indict him on the offense not mentioned in the original indictment but upon which evidence was offered and upon which the court may or may not have charged and for which there had been an acquittal. Yet the next petit jury might convict of that new offense not mentioned in the first indictment although he had already stood trial on it and had been acquitted. Clearly this cannot be tolerated under our Federal Constitution. See: *Green v. United States*, 355 U. S. 184, 78 S. Ct. 221 (1957); *United States v. Ball*, 163 U. S. 662, 16 S. Ct. 1192 (1896). It is quite true that in *Ball*, U. S. at 672, S. Ct. 1195 the Court said:

> ". . . it is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside *may be tried anew upon the same indictment; or upon another indictment, for the same offense of which he had been convicted.*" (Emphasis supplied.)

The test however is: was this a continuity of jeopardy and not a second jeopardy? Here, however, this *is* second jeopardy. If Stirone were tried again for interference with *future* contracts, he could not point to the present indictment and say, "Look at this indictment, I have already been tried for interference with future contracts." He has thus lost the protection of the constitutional prohibition against double jeopardy.

Because this is a fundamental and critical question of constitutional law, we respectfully submit that it should be passed upon by this Court. The very narrow approach followed by the Court of Appeals necessarily destroys most important rights guaranteed by the Federal Constitution.

Point III.

Petitioner Was Denied Due Process Because the Charge Was Incomprehensible; It Failed to Relate the Evidence to the Crime Charged; It Ignored the Defenses of the Petitioner; It Permitted Petitioner to Be Tried on Charges Not Covered by the Indictment; and It Failed to Define and Explain the Crime Involved.

The trial judge's handling of this trial violated the maxim that in a criminal case instructions are erroneous if they exclude from the jury an affirmative defense to which evidence has been received. See *Griego v. United States*, 298 F. 2d 845, 849 (C. A. 10, 1962); *Smith v. United States*, 230 F. 2d 935, 938, 939 (C. A. 6, 1956). The appellate panel did not disagree with this rule of law. It merely concluded that that rule was here inapplicable. We think it is applicable.

A. The petitioner in this case had offered evidence that this was a sales commission agreement. This indeed was admittedly the manner in which Rider and his wife had recorded the payments to the petitioner in their books. The petitioner was entitled to an explicit expression from the court in relation to the corroborative value to petitioner of this evidence and the effect it should have upon the jury's consideration of this case. No such discussion in proper form was given to the jury.

B. The petitioner had offered evidence from Kassab that it was petitioner who was responsible for Kassab giving the contract to Rider. The petitioner was entitled to explicit comment from the court that if the jury believed Kassab, then his testimony would back up the petitioner's contention that he was merely being paid a sales commission; that the payment to him was not proof of an extortion by the petitioner; and that as a sequitur it could conclude petitioner did not

make any threats. See *United States v. Tolub*, 309 F. 2d 286, 289 (C. A. 2, 1962).

C. The petitioner had offered evidence which would indicate that he was not even in Pennsylvania at the time of the alleged threat. If this were true, then clearly it was a substantial defense. He was entitled to have comment upon this fact in connection with determining the credibility of the witnesses. The court silenced the alibi out of the case.

Assuming *arguendo* that the court had generally discussed the legal questions involved (which it did not), it was its duty to relate the evidence to those legal points. The Court of Appeals for the Third Circuit had occasion only recently in *McNello v. John B. Kelly, Inc.*, 283 F. 2d 96 (C. A. 3, 1960), and several other civil cases since, to reverse judgments entered where the trial court failed to relate the evidence to the law so that the jury would have a comprehensive understanding of the whole case. If this is the law in civil matters, then it is doubly true where a man's liberty may be at stake.

All of this was ignored by the trial court. In truth, the law itself was not expounded to the jury in a way in which it could possibly understand what the judge was talking about. A mere reading of the record can leave no one with any question but that the jury must have totally lost all possible meaning of the effect of the various pieces of testimony after it heard the charge of the court.

The jury was left in a state of such utter confusion that it could not possibly understand the nature of the offense or the law principles involved. We only ask that the court read that charge for itself and see whether any intelligible meaning can be drawn from that assemblage of words. This was a very simple matter to charge upon. It should have been crystal clear. Given proper reference of the evidence to the law, the jury would have had no difficulty in understanding the nature of the offense under considera-

tion. Its function would have been clear and self-evident. This was not done or given. Here is how the charge reads.[4]

The court completely ignored the fact that Rider had at one point admitted that he did not even have this job when the alleged threats were made. This seriously undermined his other testimony that threats had been made to him that he would lose *this* job. The petitioner was entitled to have the court explicitly and clearly set forth this contradiction and point out its significance to the jury. This the court did not do.

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4. Pp. 285a-291a:

"Now, the issue, however, on extortion, is simply, under all this evidence, bearing in mind that as to Mr. Stirone, whether the Government has proved, the Government has offered evidence, it is up to you to say whether it is proved, but Mr. Stirone does not deny, he admits, obtaining the property. The statute then defines the term 'extortion' means 'the obtaining of property from another.' That's the first element. There is no dispute about that. It is still incumbent upon the Government to prove it beyond a reasonable doubt, and you must base your decision upon the evidence which the Government has produced. 'With his consent, induced by wrongful use of actual or threatened violence or fear.' *Well, in this case, I think it is fear.* Fear of labor trouble, fear (377) of economic loss, *fear of loss of his contract.* So those several elements are present in extortion: 'The obtaining of the property, with his consent.' Put the pressure on him to pay that money: Got—induced his consent. He did it, sure he did. After he did it—why, then, he says he did it because he was afraid of these things, these two things, one or the other, or both. (Emphasis supplied.)

"Now, if you find that to exist, under the statute, and beyond a reasonable doubt, why, then, extortion has been committed.

"* * * Did Mr. Stirone have an influence, some dominating influence over these men, or didn't he? Mr. Dierker seemed quite interested in Mr. Stirone, in his welfare at the same time, apparently, Mr. Dierker, you might consider whether he had an interest to be sure that Rider had that contract. He wanted to sell certain articles, certain commodities to Rider, and whether or not Mr. Stirone had some influence over Mr. Kassab, so that Mr. Kassab was amenable to this thing, or whether as Mr. Rider said he understood at the meeting there in Mr. Kassab's home he already had the contract. But the great conflict (383) there is between Dierker, between Mr. and *Mrs. Rider*, Mr. Dierker and Mr. Stirone on that proposition." (Emphasis supplied.)

In addition, the charge made substantive proof of that which was never testified to. Mrs. Rider, by her own testimony, was not present when the alleged meeting took place between Dierker, Stirone and Rider, at which the alleged threats by Stirone were claimed to have been made to Rider. Nonetheless when the Court spoke at 290a in respect to the "direct conflict", it charged ". . . that Mr. and *Mrs. Rider*, Mr. Rider particularly said that he [Stirone] came down there in a car with Mr. Dierker." Here the court has translated Mrs. Rider's testimony, which was clearly hearsay as to what was said and done and who was present, into affirmative direct testimony to the effect that *she* was present and had heard everything. Clearly this was absolute error that went to the heart and gist of the case. It was indeed that which went to "the great conflict" (291a) in the case. Doing so, the court added weight to the government's case where none existed. This was highly prejudicial. It cannot be ignored. It cannot be shunted to one side or swept under the carpet. It is fundamental, clear error that may very well have been that make-weight that decided the case. There is just not an iota of evidence that she was present, heard or even testified that she heard what was there said. Of course, the petitioner absolutely denies Rider's story of the meeting in its entirety. It never took place in Belle Vernon. It was at Pittsburgh. And at least four other people present corroborate the defendant. None back up Rider. His meager, self-impeaching testimony was really all the government had.

The charge in this case did not include any mention of:

1. The defense that the payments were sales commissions.

2. The important testimony of Kassab.

3. The alibi defense.

4. The reasonable fear which was necessary to convict.

The fact that these fundamental necessary elements of the crime and crucial defenses were not discussed constituted basic and prejudicial error. We submit that such omissions are so serious that they produced an unjust result. Fed. R. Crim. P. 30, 52(b), 18 U. S. C. In *United States v. Sweeney*, 262 F. 2d 272 (C. A. 3, 1959) (another Hobbs Act Case) the majority did not reach the question of the sufficiency of the charge on the question of intent but despite the fact that there were no objections the concurring opinion said (p. 277):

> "I am in accord with the majority's disposition. I would also reverse on the ground that the failure of the trial judge to give adequate instructions to the jury on the score of 'intent' (he gave none) constituted basic and prejudicial error."

The omissions in the present case were just as important. The absence of a charge on these significant facets of the case requires a reversal.

Point IV.

The Ruling of the Court of Appeals Relative to the Nature, Quality and Quantity of Proof of Fear Is in Direct Conflict With That of Several Courts of Appeals as Shown by United States v. Tolub, 309 F. 2d 286 (C. A. 2, 1962); Callanan v. United States, 223 F. 2d 171 (C. A. 8, 1955); Cape v. United States, 283 F. 2d 430 (C. A. 9, 1960); Bianchi v. United States, 219 F. 2d 182, 189 (C. A. 8, 1955) and That Conflict Must Now Be Resolved.

The essence of the crime of extortion under the Hobbs Act is that a person in a position to interfere with a segment of interstate commerce to be done by another has made threats with resultant fear to that person so that there will be an interference with the flow of such commerce unless he is paid certain things of value for abstaining from fulfilling such threat.

The petitioner had offered evidence, and this was admitted by Rider, that Rider had not had any labor peace at all through the two-year period during which he paid money to Stirone. Obviously, therefore, he was not paying for labor peace, but was paying a commission. Otherwise he would have stopped payments when the trouble started. At least the jury could have so interpreted it. It was a very simple and necessary thing for the court to have charged that phase of the case to the jury so that the jury would understand the law as outlined by the court. This was not done. It ignored that affirmative defense.

The Hobbs Act is a criminal statute. It should be strictly construed. It should cover no more than the Congressional intent incorporated in it.

The character of the fear which makes for criminality under the Hobbs Act is that the union boss would interfere with normal labor operations; that he would cause unwarranted strikes and slowdowns or make demands for unreasonable working conditions. To spread it to cover a fear of persons not connected with the particular union on the job is to legislate judicially.

The defendant had offered evidence that he had absolutely no control over any of the men who were working on this job for Rider. His proof shows that they did not belong to his union which operates in an entirely different city and does entirely different work. Under the circumstances, therefore, he would not be in a position to create labor trouble in connection with those employees. Any contention that Rider was afraid that he would do so was obviously unbelievable and an unreasonable position to take. The petitioner was entitled to a directed verdict of acquittal because there was no proof that he was in a position to harm Rider.

United States v. Tolub, 309 F. 2d, 286, 288 (C. A. 2, 1962) made it succinctly clear that defendants in Hobbs Act cases must have a relationship with the particular union before they fall in its purview. Stirone did not. Absent that *sina qua non*, a conviction under this statute

cannot stand. In *Tolub, supra*, the conviction was affirmed because the court thought there was such evidence. It said at pp. 288, 289:

> "There was ample evidence from which the jury could find that Tolub *was in a position to harm* Bass-Feit, Inc. *and that fear of such harm was reasonable.*". (Emphases supplied.)

Here the record is absolutely bare of any proof that Stirone had a stick to wield, or wielded it. There is no evidence that he had power, nor that he claimed he did, to cause Rider labor trouble. He was in no way connected with the union involved or any union in the area. And the fact that Rider thereafter had more trouble on this job than he ever had on any other job but kept on paying for years, plus the fact that he on his own marked these payments as "commissions", completely disprove any threat or power petitioner might have had to influence the union on this job.

Since the evidence in this case incontrovertibly establishes that Stirone had no connection with the union involved in the job at Allenport or in any union in that area, there was no reasonable basis for Rider to be afraid of him. That lack of fear exists whether it be considered on the basis of Stirone's own lack of connection with the union Rider had to deal with or on any theory that Stirone represented any other union that could influence that particular union. For this reason the motion for directed verdict of acquittal should have been granted as well as motion for judgment on the whole record.

At least the petitioner was entitled to have the court say something to the jury about his lack of connection with the union in question when it considered the reasonableness of Rider's alleged fear if it existed at all. See *Callanan v. United States*, 223 F. 2d 171 (C. A. 8, 1955). It went to the very serious question as to whether in fact there had been any threat made to Rider in the first instance. The court never touched on the question of reasonableness of

the alleged fear. It was ignored by the learned trial judge. That defense was lost to petitioner by the court's silence. At least, in the alternative, the judge was under a heavy duty to analyze the evidence, relate it to the elements of the crime charged, and explain to the jury the effect of these uncontradicted, contrary proofs that negated fear in this case. These were of such impact that the failure to charge thereon is fundamental error. As an irreducible minimum, a new trial must be granted.

CONCLUSION.

We respectfully submit that the petitioner should not have been subjected to a second trial on a null and void indictment. If the government insists on further prosecution, it should go before the only body that has the power to indict—the grand jury. The original indictment had already been exhausted and destroyed by the amendment at the first trial. This major problem involved in the Petition is constitutional. Unless it is answered, this case cannot be concluded justly.

If *Ex parte Bain* is the foundation on which the rule here is to be built, and we believe it is, then the conviction must be set aside and the petitioner discharged.

The *only* witness for the government was Rider. His testimony was self-impeaching and contradictory. At least four solid citizens point-blank contradicted him. We respectfully suggest that Rider's testimony was so self-impeaching that it could not possibly sustain a conviction. See *Hinton v. United States*, 196 F. 2d 605 (C. A. D. C., 1952). But assuming that there was enough evidence to go to the jury and a conviction could be sustained thereon, we respectfully submit that the charge is so confusing and unintelligible that it is impossible to believe that the jury had any comprehension of the crime charged, its component elements and the nature of proof necessary to sustain it.

Going one step further, the submission as made was fundamentally erroneous because it failed adequately to

relate the evidence to the charge made. It was the court's duty to review not merely the government's evidence but also the defendant's evidence in contradiction. The complete failure of the court to discuss the defenses and the evidence pertaining to it made this charge so one-sided as to amount to a summation for the prosecution rather than the impartial submission expected in a court of justice. This violated the *McNello* rule, *supra*, and the pertinent law in all federal courts today.

The charge was further prejudicial in that it permitted the jury in numerous instances and ways to find the defendant guilty of crimes not charged in the indictment nor specified in the bill of particulars. Such error, we respectfully submit, necessitates a new trial. It violates the *Stirone* rule.

The failure of trial counsel in some few areas to take exceptions or raise objections should afford the government no cover to protect it from review by this Court for fundamental error is involved here. Counsel in a case of this kind, in the face of the obvious animosity from the bench, was in an even worse dilemma than was counsel in *Okotkewicz v. Pittsburgh Rwy. Co.*, 397 Pa. 303 (1959). To rise each time the court indulged in one of the many actions which we believe were prejudicial error, would have guaranteed the jury's rejection of any of petitioner's arguments for it would certainly have believed "that the plaintiff's attorney was trying to prevent . . . [the] telling of the true story" (at 308).

For these reasons petitioner respectfully prays that the Writ issue.

Respectfully submitted,

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Of Counsel.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,824

THE UNITED STATES OF AMERICA,

v.

NICHOLAS A. STIRONE,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued September 18, 1962
Before MARIS, MCLAUGHLIN and GANEY, *Circuit Judges.*

OPINION OF THE COURT.

(Filed November 26, 1962)

By MCLAUGHLIN, *Circuit Judge.*

Appellant was convicted upon an indictment charging a violation of the Hobbs Act, 18 U. S. C. § 1951, in that he, as a labor leader, extorted $31,274.13 from one William G. Rider by the use of threats of labor trouble which would obstruct and prevent Rider from performing a valuable contract. Appellant's previous conviction upon the same indictment had been reversed, Stirone v. United States, 361 U. S. 212 (1959) because an issue not charged in the indictment was submitted to the jury in that trial.

The first contention is that appellant was tried under a void indictment. The argument suggests that since the Supreme Court has held that the indictment on the first trial was, in effect, amended, it became invalid; therefore the second trial was a nullity in the absence of the return of a new indictment. Appellant cites no relevant case. He relies on Ex parte Bain, 121 U. S. 1 (1886). As stated by the Court in Stirone v. United States, supra at 216-17, the rule of Ex parte Bain is that "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." Changes other than by the grand jury defeat the great importance which was attached to an indictment by grand jury at common law and which has been carried into our Constitution as a primary element of our jurisprudence. Ex parte Bain, supra at 10-11; U. S. Const., Amend. 5. That much is crystal clear. The conclusion, however, which appellant would have us draw from this fundamental principle is a complete non sequitur.

In both Bain and Stirone the indictment was materially altered: in the former by deletion of a phrase, in the latter by admitting evidence which was beyond the scope of the indictment's charge. In each situation the basis for striking down the alteration on appeal was that the charging part of the indictment was changed and was no longer the indictment of the grand jury who presented it. The protection of the grand jury, to which the defendants were entitled had been denied at those trials. No such defect exists here. It is simply not the fact that appellant at this second trial has been deprived of his "substantial right to be tried only on charges in an indictment returned by a grand jury," Stirone v. United States, supra at 217, for he was tried solely upon the charges laid in the grand jury's indictment. Thus, the constitutional guarantee announced in the fifth amendment and further underscored by such opinions as Ex parte Bain, supra, and Stirone v. United States, supra, is left intact.

Nor is there any merit in the further argument that it was necessary to resubmit the issue to a new grand jury for a new indictment. Ex parte Bain, supra, under its facts rightly calls for this, when that court quotes with approval from the language of Chief Justice Shaw in Commonwealth v. Drew, 3 Cush. 279 (Mass. 1849), to the effect that where there is some defect in an indictment, as a wrong name or addition, "the proper course is for the grand jury to return a new indictment, avoiding the defects in the first." Since there are no defects in the present indictment to be corrected, there is no reason for resubmitting it. Cf. State v. Smith, 49 La. Ann. 1515, 22 So. 882 (1897).

Appellant next assigns as error several matters relating to the conduct of the trial and the sufficiency of the evidence. There was trial testimony that in September, 1951 Rider was in the ready mixed concrete business with a batching plant at Belle Vernon, Pennsylvania, on the premises of the Duquesne Slag Products Company from whom he was obligated to buy his sand and slag.[1] Some time early in that month he read in the newspapers that the construction firm of Ragnor-Benson, Inc., had been awarded a contract by Pittsburgh Steel Company to act as principal contractor for the construction of a steel mill. In an attempt to secure the concrete supply contract in connection with this, Rider made an appointment with the vice president of Ragnor-Benson, Jacob G. Kassab, to discuss the bid he had submitted and his chances of obtaining the job. Rider, accompanied by his wife, met with Kassab that night in the latter's home, at which time Kassab told Rider that he "had nothing to worry about," and that he "had the contract." This agreement between Rider and Ragnor-Benson was formalized by written contract of September 25, 1951. Rider's first pour on the work was made on September 13. Shortly afterwards, but prior to September 25, appellant, accompanied by Dierker, the president of Du-

1. No question is raised on appeal concerning the interstate commerce aspects of this case.

quesne Slag Products, visited Rider at his plant. Rider testified that on this occasion appellant demanded that Rider pay him 50¢ a cubic yard for the concrete that went into the Ragnor-Benson operation. These payments were necessary if Rider was to "hold onto the contract and also to keep me out of labor trouble." Because of his fear of economic loss Rider acquiesced and thereafter paid appellant the amounts demanded. The numerous checks which Rider gave appellant pursuant to that arrangement were recorded by his wife in a special separate account as commissions. Appellant's defense was that he was on the west coast at the time of the alleged extortion and further, the payments represented true consideration for his promise to use his influence with Ragnor-Benson to secure the concrete sub-contract for Rider.

Appellant now asserts that the trial judge's questioning of witnesses was objectionable in that he "improperly injected himself into the case in aid of the prosecution."

Preliminarily we need only repeat what has by now become axiomatic in our federal system of jurisprudence. It is the right and duty of the judge to act in the interrogation of witnesses to end that the truth emerge and be reflected in the judgment. Thus, if the issues are obscured or the testimony misunderstood, he is entitled to and should interrogate witnesses to help render understandable such matters. Glasser v. United States, 315 U. S. 60, 62 (1941); Quercia v. United States, 289 U. S. 466 (1932); United States v. Amorosa, 167 F. 2d 596, 600 (3 Cir. 1948); Knapp v. Kinsey, 232 F. 2d 458, 466 (6 Cir.), cert. denied, 352 U. S. 892 (1956); United States v. Aaron, 190 F. 2d 144, 146 (2d Cir. 1951); Simon v. United States, 123 F. 2d 80, 83 (4 Cir.), cert. denied, 314 U. S. 694 (1941); Fidelity & Deposit Co. of Maryland v. Bates, 76 F. 2d 160, 170 (8 Cir. 1935); United States v. Lee, 107 F. 2d 522, 529 (7 Cir.), cert. denied, 309 U. S. 659 (1939); Kettenback v. United States, 202 Fed. 377, 385 (9 Cir.), cert. denied, 229 U. S. 613 (1913). There are instances where the bounds of judicial propriety have

been overstepped, e.g., United States v. DeSisto, 289 F. 2d 833 (2 Cir. 1961); United States v. Quercia, supra; Knapp v. Kinsey, supra, however, in each question on review the paramount consideration is whether the judge has seen to it that all admissible evidence helpful to an intelligent understanding of the issues is before the jury to aid it in its deliberations.

Judged by that standard we find no error in the five instances of trial court participation cited by appellant. We also note that these objections are being raised for the first time on appeal. Initially complaint is made of the court's questioning of Rider. Rider was being cross-examined as to the exchange which took place between himself and appellant at the time of the alleged extortion. In an attempt to clarify this line of inquiry the court asked: "What do I understand might happen to you, Mr. Rider with your contract, if you didn't pay the 50 cents?" Rider's response and further questions from the court elicited the fact that Rider was afraid that (1) he would lose his recently acquired contract with Ragnor-Benson and (2) he would not obtain any more contracts in the future. Appellant's objection to the admissibility of the latter statement is not well taken. It is well settled that testimony showing the state of mind of the victim is permitted in Hobbs Act cases. Bianchi v. United States, 219 F. 2d 182, 192 (8 Cir.), cert. denied, 349 U. S. 915 (1955); United States v. Compagna, 146 F. 2d 524, 529 (2d Cir.), cert denied, 324 U. S. 867 (1945).

> "The gist of the unlawful act is extortion. Extortion involves a state of mind as an element of an offense under the Act. Unless there is some form of compulsion (either physical or fear) there is no crime under this Act. * * * It was, therefore, essential to show that such payment was under such compulsion. The existence of this compulsion might be proved in

several ways but one proper way is to show the state of mind under which the committee acted * * *."

Nick v. United States, 122 F. 2d 669, 671 (8 Cir.), cert. denied, 314 U. S. 687 (1941). As to the first half of Rider's response appellant objects that the question, for the first time, brought into the trial the disputed fact that Rider already had a contract and that he was afraid of losing it. This is not supported by the record. On direct, Rider had answered the same question of why appellant wanted the payments by saying: "Well it's to hold onto the contract and also to keep me out of labor trouble." On cross-examination counsel himself recognized this fact by asking "Well, now, during the course of this conversation in the car [with appellant], when was any mention made that you wouldn't be able to keep the contract with Ragnor-Benson," and again, "did he say that he would just tell Jake Kassab or Ragnor-Benson to take it away from you?" These queries produced additional evidence establishing the existence of the oral contract.

Appellant also objects to the court's interrogating him concerning his story regarding the method of payment. On direct, counsel specifically asked appellant whether any mention was made between Rider and himself as to payment procedure. Appellant said that in response to a question from Rider regarding that, he replied " 'Why I don't know why you should ask me that. I think that, without reservation, you should pay me in a legitimate manner that you would normally pay anybody else,' because I intended to see to it that I reported it to the Internal Revenue and paid the taxes on it." This line of examination and the implications of appellant's statement that he intended to pay taxes on the money received was then dropped until the end of cross-examination, when the court tried to ascertain the meaning of appellant's statement. Appellant at this time claims that the court's questioning, pivoting on "Wasn't that a rather strange thing for you to say?", was highly prejudicial in that it "could well have" heavily weighted

the jury's determination of whether this was a shake-down or sales commission arrangement. We cannot agree. Appellant's testimony on direct, which counsel brought out himself, was left in limbo so that the meaning and significance of the answer was doubtful and it was the court's right and duty to attempt to find out what appellant meant. The characterization which the court in passing gave to the answer would seem a normal reaction to the unusual response itself. In any event this minor incident did not result in substantial harm to appellant by itself or in combination with other alleged trial errors.

Appellant's third complaint relates to the direct examination of Mrs. Rider. We find no merit in his contention that the trial judge improperly admitted prejudicial hearsay by asking Mrs. Rider why her husband had said that he was making the payments to appellant. The record reveals that the court carefully instructed Mrs. Rider to what extent she could answer and expressly indicated to the jury that it could only consider this evidence as bearing on the state of mind of or the reason why Mr. Rider had said he was making the payments.

Appellant's two remaining objections on this phase of the appeal do not warrant discussion. On balance we find that "the questions of the trial judge above referred to were obviously for the purpose of developing facts helpful to an intelligent understanding of the matter not only by him but to the jury." United States v. Amorosa, supra at 600. The record as a whole reveals no improper participation or bias on the part of the district judge who conducted this difficult trial in a particularly even-handed manner.

Appellant alleges as reversible error that the charge of the trial court was too favorable to the government and failed to relate the evidence to the elements of the crime charged. No objections were made by defense counsel at the trial, despite the court's specific query whether there were any objections or additional matters on which counsel wished the jury instructed.

The charge carefully emphasized several times the presumption of appellant's innocence and the burden placed upon the government to establish his guilt by evidence beyond a reasonable doubt upon all material elements of the crime before a conviction was possible. The meaning of "reasonable doubt" was outlined most favorably to appellant. The particulars of the crime were tied to what the government had to prove beyond a reasonable doubt, again emphasizing that the jury must make that kind of finding regarding each part under the statute for conviction. The charge stated that the jury was the sole judge of the facts and the credibility of the witnesses. The various factors which might be looked to in determining the weight of testimony and credibility of a witness were named. It was pointed out that, in light of the conflicting stories told, the credibility of the witnesses was the crux of the matter. To illustrate this, the charge referred to the direct conflict between Rider on the one side and Dierker and appellant on the other, as to whether the meeting in the car claimed by Rider ever occurred and listed the items which could be considered in making this decision.

The brunt of appellant's argument is that the court failed to give his theory of defense to the jury. From this appellant would assume that its legal effect was to preclude the jury from considering his attempted explanations. That presupposes that the charge purported to be a review and summary of the evidence, which is not true. The charge was in essence a statement of the legal principles necessary to be found by the jury to exist, beyond a reasonable doubt, before it had the right to convict appellant. And the statutory elements were related to the facts adduced at the trial, which significantly distinguishes the circumstances before us from those found in McNello v. John B. Kelly, Inc., 283 F. 2d 96 (3 Cir. 1960), referred to by appellant. In that suit, involving a negligence problem, the charge as to the law was made entirely in vacuuo and was not applied in any way to the facts tending to prove the issue of the

defendant's liability. Specifically, we mention that it was not error to fail to give an instruction as to appellant's alibi in the absence of any request for it.' Goldby v. United States, 160 U. S. 70, 77 (1895); United States v. Tramaglino, 197 F. 2d 928, 932 (2 Cir.), cert. denied, 344 U. S. 864 (1952). Appellant's further thought that the trial judge erred in not referring to appellant's unrefuted testimony that he had no jurisdiction over any of Rider's employees and thus Rider's fear must have been unreasonable is not well taken. See United States v. Varlack, 225 F. 2d 665, 668, 670 (2 Cir. 1955).

More fundamentally, we feel that the proposition which appellant now argues is not timely. The rule of this trial is well stated in Apel v. United States, 247 F. 2d 277, 282-83 (8 Cir. 1957) as follows:

> "The evidence of a defendant in a criminal case is not subject to the limitation of required pleading and definitive issue, and in the effort made to create doubt generally on such a trial there often is no desire to have the case pinned down to a definite theory before the jury. On this practical basis, as well as for reasons of orderly procedure, the trial court ordinarily is entitled to have a defendant advise, by a tender of instructions, of whatever specific theory or theories, if any, he may finally choose to rely upon and wish to have pointed out to the jury.
>
> "Here, the situation clearly was not one of such complexity or probable confusion as to make it necessary for the court, in the interest of justice, and without a tendered instruction, to point out specifically such theory or theories of defense as the court deemed capable of existing on the evidence, in order to insure understanding on the part of the jury. We do not feel that the jury could have failed, from the evidence and argument, to understand appellant's theories and contentions. Nor was the court's general charge such

in its form or substance as could be said in any way to have left appellant's theory or theories impliedly deprecated or disparaged by the failure to make mention of them."

This appeal certainly does not fall into the area of exception noted above:[2] the trial was short, and, as appellant says in his brief, "there were very few important issues of fact that required jury determination * * *."

Taking the charge as a whole and under the important circumstances that appellant, until now, had no objection to it,[3] we are satisfied that the court did not commit reversible error in connection with this point. Cf. Goldsby v. United States, supra; Humes v. United States, 170 U. S. 210, 211-12 (1898); United States v. Griffin, 176 F. 2d 727, 730 (3 Cir. 1949), cert. denied, 338 U. S. 952 (1950); United States v. Alfano, 152 F. 2d 395, 397 (3 Cir. 1945). The opinions on which appellant depends, Griego v. United States, 298 F. 2d 845, 849 (10 Cir. 1962); Smith v. United States, 230 F. 2d 935, 939 (6 Cir. 1956), are not opposed. As appellant accurately states, they stand for the general maxim that in a criminal case instructions are erroneous if they exclude from the jury an affirmative defense to which evidence has been received. The fatal defect in Griego was that the court wrongly interpreted a section of the statute charging the crime so as to effectively exclude the

2. There is a possible second exception: "the sensitive defense of insanity". Apel v. United States, supra at 282; Holloway v. United States, 148 F. 2d 665 (D. C. Cir. 1945), cert. denied, 334 U. S. 852 (1948); Tatum v. United States, 190 F. 2d 615 (D. C. Cir. 1951).

3. Rule 30 of the Federal Rules of Criminal Procedure provides in pertinent part that:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection * * *."

defense thereto. In Smith the court's charge misstated the defendant's position so that, in effect, his true defense was barred. The rule of those decisions has no bearing on our question.

The next major contention is that the charge was so confusing it removed from the jury's consideration the question of whether Rider was placed in fear by appellant's threats. An effort is made to bolster this by quoting two fragments of the charge. From the first, appellant concludes that the judge conveyed the unmistakable impression to the jury that he was convinced that Rider reasonably feared economic loss. Even that isolated instance cannot be soundly so interpreted. The judge, carefully outlining the crime, stated that its primary statutory element was "fear" and not "actual or threatened violence."[4] His statement "Well, in this case, I think it is fear," which immediately followed a quotation from the pertinent section of the statute, is not at this stage to be twisted to mean that the issue of fear was removed from the jury's deliberation. This is demonstrated by his instruction which followed the reference to the need of proving fear of economic loss wherein he said: "Now if you find that to exist, under the statute, and beyond a reasonable doubt, why, then, extortion has been committed." With that mandate and several other statements throughout the charge the court sharply impressed upon the jury that unless it concluded that Rider feared economic loss if he did not comply with appellant's demands, appellant could not be found guilty under the indictment.

Appellant urges that the second fragment of the charge which he quotes substituted Dierker's and Kassab's fears of the appellant for those of Rider. That assertion has no support when the passage is read in its context. The court

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4. Title 18 U. S. C. § 1951(b)(2) provides:

"The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

was referring to the possible influence which appellant might have over Dierker and Kassab solely in connection with their credibility as witnesses. The preceding portions of the charge, not mentioned by appellant, were to the effect that the credibility of the witnesses was for the determination of the jury. This provided the setting within which the portion objected to must be read. In addition, appellant contends that the last sentence of this part of the charge—"But the great conflict there is between Dierker, between Mr. and Mrs. Rider, Mr. Dierker and Mr. Stirone on that proposition"—eliminated the testimony of Kassab from the jury's consideration. He urges that this was fundamental error because the "great conflict" referred to was the question of whether Rider understood at Kassab's home that he already had the contract, and therefore Kassab's mentioned testimony was crucial. However, at the beginning of the same paragraph the court says:

> "Now there are some things in this case, the contentions for instance, that Mr. and Mrs. Rider, Mr. Rider particularly said that he came down there [the batching plant] in a car with Mr. Dierker. He was told then what he was to do. You heard that testimony. Mr. Dierker said no such thing happened; so did Mr. Stirone. *That's a direct conflict.*" (Emphasis supplied.)

This of course is the "great conflict" referred to later on in the paragraph.

All of the above discussion of the charge convincingly illustrates that the latter must be construed in its entirety and not by disjointed and set apart phrases. Pomerantz v. United States, 51 F. 2d 911, 913 (3 Cir. 1931); Boyd v. United States, 271 U. S. 104, 107 (1925). On that solid premise we find that there was no tendency in the charge to mislead the jury.

Finally, appellant maintains that he may have been convicted on evidence outside the scope of the indictment, and that Rider's testimony was insufficient to support a conviction.

He first urges that he may have been convicted in violation of the precept of United States v. Stirone, supra, by reason of Rider's testimony that he was afraid that he would lose future contracts as well as the Ragnor-Benson contract. This is merely a restatement of his second point, supra. As we there said, that type of evidence is proper in *Hobbs Act trials going as it does to the state of mind of the victim.* Bianchi v. United States, supra; United States v. Compagna, supra; Nick v. United States, supra. And it is to be remembered that the charge contained no instruction or implication that appellant could be convicted by reason of Rider's fear of losing future contracts. Actually, the court made it very definite by reading the express wording of the indictment and further instructions, that conviction was only possible if the jury first found "fear of loss of his contract" with Ragnor-Benson.

On his challenge to the sufficiency of the proof, appellant complains of alleged conflicts in the testimony of Rider, the government's key witness, as to whether there was an existing contract with Ragnor-Benson at the time of the extortion. The circumstances that a witness' testimony may to some extent be self-contradictory does not prevent its constituting substantial evidence. Ryan v. United States, 99 F. 2d 864, 868 (8 Cir. 1938); Craig v. United States, 81 F. 2d 816, 818 (9 Cir. 1936); cf. Yellow Cab Co. v. Kelly, 62 F. 2d 1032 (3 Cir. 1933). Appellant tells of two instances of so-called contradictory testimony. In the first he would have it that Rider testified on cross-examination that he made the first pour on the Ragnor-Benson job before the oral agreement, in contradiction of his prior story that he had the contract and then made the pour. The record does not reveal the claimed positive contradiction, for Rider's response that he made the pour "Before that" could well be interpreted to mean before the written contract of September 25, concerning which he had just been talking. Fault is also found with Rider's statement, "if I didn't get the contract and hold onto it, why I was in hot water," which

appellant now says is inconsistent with Rider's other testimony that he did have an oral contract at the time of appellant's threats. Again there is an opposite inference to be drawn, namely, that if Rider could not hold on to the contract once he had it, he was "in hot water." By placing the emphasis on the "holding on" portion of the sentence appellant's version completely fails. Appellant's main arguments to us concern questions of evidence which were properly submitted to the jury and properly decided by that body. The reasonable doubt which will prevent conviction must be the jury's doubt and not that of this court. Craig v. United States, supra at 27; Felder v. United States, 9 F. 2d 872, 875 (2 Cir. 1925), cert. denied, 270 U. S. 648 (1926). Putting it mildly, there was nothing inherently unbelievable about Rider's testimony, and if the jury believed, as it must have, his evidence is sufficient to support the conviction. Glasser v. United States, 315 U. S. 60, 80 (1942); United States v. Brill, 270 F. 2d 525, 527 (3 Cir. 1959); United States v. Giuliano, supra at 584.

Rider testified on several occasions that the payments were made so that he could "hold onto the contract" and that he "couldn't afford to lose it." He stated that at the conclusion of his visit with Kassab he was told that he "had nothing to worry about," he "had the contract." He and his wife testified to the September 13 pour made on the Ragnor-Benson job, a fact which the jury could find was consistent with a pre-existing contract.

Clearly, there was substantial, valid evidence to sustain appellant's conviction. Cf. United States v. Giuliano, supra at 583; United States v. Allard, 240 F. 2d 840, 841 (3 Cir. 1957). There was no reversible error.

The judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,824.

UNITED STATES OF AMERICA

v.

NICHOLAS A. STIRONE,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Present: MARIS, MCLAUGHLIN and GANEY, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest: HARRIET G. HUMPHRYS,
Chief Deputy Clerk.

November 26, 1962.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,824.

UNITED STATES OF AMERICA

v.

NICHOLAS A. STIRONE,
Appellant.

ORDER SUR PETITION FOR REHEARING.

Present: MARIS, MCLAUGHLIN and GANEY, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT:

MCLAUGHLIN,
Circuit Judge.

Dated:

December 17, 1962.